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March 20, 2003

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: Consolidated Application for Authority to Provide In-Region, InterLATA Services in New Mexico Oregon, and South Dakota, WC Docket No. 03-11.

Dear Ms. Dortch:

AT&T submits this *ex parte* letter to respond to Qwest's March 6, 2003 *ex parte* in support of its claim that its New Mexico Section 271 application satisfies Track A.[1] It remains undisputed that Qwest is the *only* provider of residential wireline local telephone service in New Mexico. Qwest therefore contends that Track A can be satisfied based on a single New Mexico wireless provider and a handful of resellers. Although the Commission has in the past recognized that a PCS wireless service *could* satisfy Track A, the Commission has emphasized that a Section 271 applicant bears a substantial burden of proving that a particular wireless service is an "actual commercial alternative" to the applicant's wireline service.[2] Qwest still fails to offer any legitimate evidence that the wireless carrier in New Mexico (Leap Wireless) is an "*actual* competitive alternative" to Qwest's wireline service as required by the Act. Moreover, the Act expressly precludes Qwest from relying on resale-only residential providers to satisfy Track A.

The Leap Wireless "Cricket" Service. Qwest continues to rely upon a hopelessly deficient survey of Cricket customers. If a survey respondent answered "yes" to a hypothetical question asking whether "some Cricket customers *might* decide that Cricket service does away with the need to have traditional wire line phone service in their home," and then answered "no" to the question "do you have wireline local telephone service in your home," that respondent was

[1] 47 U.S.C. § 271(c)(1)(A).

[2] *See Louisiana II 271 Order* ¶¶ 31-34.

counted by Qwest as an individual who actually substituted the Cricket wireless service for Qwest's wireline service.[3] There are many problems with Qwest's survey. For example, as noted, the survey was conducted in two rounds. If a respondent indicated that she did not understand one of the hypothetical questions in the first round, Qwest did not count that person among the respondents that have substituted wireless for wireline service. In the second round of questioning, Qwest called back the respondents that had answered "yes" to question 3 in the first round, and asked whether the respondent currently has "wireline" local telephone service. If the respondent indicated that she was confused about the word "wireline," Qwest provided a definition of the term. If the respondent then ultimately answered "no" to that call-back question, Qwest counted that respondent as a person that has substituted Cricket's wireless service for Qwest's wireline service. But if the respondent was confused about the term "wireline" as used in the call-back question, then the respondent must also have been confused about the same term as used in the original hypothetical question. By Qwest's own logic, therefore, Qwest should have removed all respondents that indicated confusion about the term "wireline" in the call-back question from those that answered "yes" to the corresponding hypothetical questions. Qwest did not do that.

As Qwest now recognizes, its survey is further undermined by the fact that it provoked inconsistent answers. As one example, at least 30 percent of the respondents answered "yes" to questions 2 and 3.[4] According to Qwest a "yes" answer to question 3 indicates that the respondent had never connected Qwest's wireline service, but had instead purchased Cricket's wireless service. And according to Qwest, a "yes" answer to Qwest 2 means that the respondent disconnected a Qwest wireline service *after* obtaining service from Cricket. As the NMPRC pointed out, answering "yes" to both questions is "contradictory" – it is impossible to disconnect a Qwest wireline service that the customer never purchased.[5] Either Qwest's interpretations of the answers to these questions are wrong, or the respondents did not understand the questions.[6]

Qwest responds that these contradictory answers "indicate, at most, that [the respondents] . . . may not have made a clear distinction between or among different types of substitution."[7] But customers were not asked about "different types of substitution," rather they were asked: (1) *might* a Cricket customer choose not to subscribe to Qwest's wireline service; and (2) *might* a Cricket customer cancel an existing Qwest wireline service after purchasing the Cricket service. A respondent that answered "yes" to those questions likely meant that she "might" do both of those things. No respondent that understood both questions could possibly have meant that they

[3] Qwest Reply at 13-14 & n.16.

[4] *NMPRC Section 271 Final Order* ¶ 149 (indicating 30 percent of customers answered "yes" to both questions"); *see also* Qwest 2/13 Ex Parte, Attachment 2, at 1 (indicating that as many as 89% of customers answered "yes" to both questions").

[5] *See, e.g., NMPRC Section 271 Final Order* ¶ 149.

[6] In addition, the record shows that many of Cricket's customers are young adults who would not otherwise purchase wireline service, *i.e.,* customers who are *not* substituting Cricket's wireless service for Qwest's wireline service. *See, e.g.,* AT&T at 15-16; AT&T Reply at 6-7. Yet, it would be perfectly reasonable for such a customer to answer "yes" to the hypothetical prospect that "some Cricket customers" – although not the respondent herself – "*might* decide that Cricket service does away with the need to have traditional wire line phone service in their home." It also would be reasonable, and truthful, for the same respondent to answer "no" to the question "do you have wireline local telephone service in your home." Qwest's survey nevertheless erroneously counts *all* such responses as people who actually substitute Cricket's wireless service for Qwest's wireline service.

[7] Qwest Reply at 14.

actually do both things – that would be impossible. Put simply, Qwest's survey either elicited responses about hypothetical – not "*actual*" – behavior, or the respondents did not understand the questions. Either way, the survey is useless for assessing whether the Cricket service is an actual commercial alternative to Qwest's wireline service.[8]

Given the unreliability of the Qwest survey results, the Commission should defer, as it customarily does, to the state regulatory agency's findings. The New Mexico Public Regulatory Commission ("NMPRC") is, in this particular situation, in a much better position to assess the Qwest survey evidence than is the Commission. The NMPRC conducted several days of hearings, which included a cross-examination of Qwest's pollster, Mr. Fredrick, and testimony from another expert statistician, Dr. David Daniel, who testified that Qwest's survey was fundamentally flawed.[9] The NMPRC's finding that Qwest has not "met its burden of showing there is an actual and significant number of Cricket subscribers in Qwest's New Mexico territory who have substituted broadband PCS service for Qwest wireline service" therefore deserves substantial deference.[10]

In a recent *ex parte* Qwest purports to provide the Commission with "new" evidence in an apparent attempt to justify ignoring the NMPRC's analysis and findings.[11] But the "new" information provided by Qwest consists only of the spreadsheets showing the actual telephone numbers of respondents and the answers given by each respondent to each question. In other words, Qwest has now provided the underlying data used to produce its estimates cited by its experts. At best, this information allows the Commission to check Qwest's math. It does not provide the Commission with information that was not considered in the state proceeding. As Qwest admits, the parties and the NMPRC staff all had access to that same information. And that information was used by parties to prepare for and conduct cross-examinations of Qwest witnesses.

Aside from the flawed survey, the only other evidence of wireless for wireline substitution provided by Qwest is the fact that Cricket markets its service "as a *potential* replacement for a first or additional home landline."[12] But the Act's requirements obviously cannot turn on aspirations expressed in commercial advertisements. As explained by the NMPRC, "Qwest also presented how Cricket management would like consumers to *perceive* its service, but there is nothing in this evidence demonstrating that consumers are *actually using* this service as a replacement to Qwest wireline service."[13]

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[8] Qwest also denies that the survey questions were "hypothetical" or that they elicited hypothetical answers. Qwest Reply at 12. But that argument is refuted by the survey results. According to Qwest about half of the respondents that agreed that "some Cricket customers *might* decide that Cricket service do[] away with the need to have traditional wire line phone service in their home," later confirmed that they themselves continued to subscribe to Qwest's wireline service. Qwest Br., Teitzel Decl., EXHIBIT-DLT-TRACK A/PI-NM-5 (Frederick Direct Testimony), at 26.

[9] Transcript of Proceedings, *In the Matter of Qwest Corporation's Seciton 271 Application And Motion For Alternative Procedure To Manage The Section 271 Process*, Case No. 3269 (NMPRC, June 10-11 2002).

[10] *NMPRC State 271 Order* ¶ 155.

[11] *See* Qwest 3/6 Ex Parte Letter.

[12] Qwest Reply at 6-9.

[13] *See NMPRC Section 271 Final Order* ¶ 143 (emphasis in original). Qwest also refers to "the Commission's recent recognition" that customers substitute Cricket's wireless for Qwest's wireline services. Qwest at 7. That is not true. Rather, the Commission was simply reciting claims made by *Cricket*, not findings made by the

The fact that Qwest is unable to provide any legitimate or concrete evidence that Cricket wireless service is an actual commercial alternative to Qwest's wireline service is not surprising. There are fundamental deficiencies in the Cricket wireless service that render it an untenable substitute for any traditional wireline service. For example, the Cricket service lacks important E-911 capabilities that allow call centers to locate, in an emergency, the wireless caller (and return the customers call if necessary). The Cricket service also is not subject to local number portability requirements, which means that a Qwest wireline customer that attempted to migrate from Qwest's wireline service to Cricket's service would not be able to retain her original telephone number (nor could a Cricket customer keep her telephone number if she wanted to switch carriers). In addition, the Cricket service does not allow customers to have multiple handsets – *e.g.* one in the bedroom, one in the kitchen and one in the home office. And unlike Qwest's wireline service, Cricket's wireless service locks its customers into long-term contracts of at least 12-months. Cricket also does not offer broadband services that are on par with Qwest's wireline DSL service.

Qwest does not deny that the Cricket service lacks these critical functionalities. Instead, Qwest claims that these deficiencies are not relevant to a Track A inquiry. According to Qwest, the Commission has recognized that "certain functional and technical differences between [wireless] PCS and wireline local exchange service" do not necessarily disqualify the PCS service from being a relevant service for the purposes of Track A.[14] But that does not mean that *any* "functional" or "technical" difference between the Leap Wireless service and Qwest's wireline service can be ignored. Indeed, Congress expressly recognized that communications services that lack important functionalities cannot be relied upon by a Section 271 applicant to satisfy Track A. For instance, the Act precludes applicants from relying on cellular wireless services to satisfy their Track A burden.[15] Therefore, to the extent that the Cricket wireless service lacks the same type of important functionalities that cellular services cannot provide – *e.g.,* E-911, number portability, multiple handsets, and DSL – it would be arbitrary and unlawful for the Commission to find Track A compliance based on the Cricket wireless service.

Resale. The Commission likewise should reject Qwest's proposal that the Commission rely (for the first time) on residential resale services as a substitute for facilities-based wireline services to satisfy Track A. Qwest simply fails to address, much less refute, AT&T's analysis demonstrating that Qwest's proposal is unlawful under the text of the statute. As AT&T and other commenters demonstrated, the text of Track A makes clear that a competitive service must be provided "either exclusively or predominantly over [the competitor's] own telephone service facilities."[16] Resale services cannot satisfy this statutory test because resale services are provided entirely over *Qwest's* facilities. Indeed, as AT&T demonstrated, the legislative history is unequivocal in stating that a BOC cannot rely upon pure resellers to satisfy the Track A

Commission. *See* Seventh Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 17 FCC Rcd. 12985, 13018-19 (2002). Moreover, the Cricket claims referred to in that report do not indicate whether the alleged substitution occurred in New Mexico, or in other states. *Id.*

[14] Qwest Reply at 16 (citing *Louisiana II 271 Order* ¶ 28).

[15] 47 U.S.C. § 271(c)(1)(A).

[16] 47 U.S.C. § 271(c)(1)(A); AT&T at 11-13; AT&T Reply at 5; WorldCom at 4.

requirement.[17] Because the statutory text squarely precludes Qwest's proposal, that should be the end of the analysis.

Qwest does not address AT&T's statutory analysis directly, but contends that "the Commission has now twice stated expressly that the residential component of Track A may be satisfied through evidence of resale competition if there is facilities-based business competition," citing the Commission's *Louisiana II 271 Order* and its *Kansas/Oklahoma 271 Order*.[18] Contrary to Qwest's assertion, however, the Commission expressly stated in these orders that it has not decided this issue.[19] Thus, the Commission has never actually approved an application where residential customers were served only via resale. Now that the Commission is squarely presented with that issue, it should reject Qwest's position.

As a textual matter, the statute plainly does not permit the residential component of Track A to be satisfied by resale alone, even if there is facilities-based competition for business customers. As explained by one of the principal authors of the 1996 Act:

> [T]he Department [of Justice] wrongly takes the view that section 271(c)(1)(A) is satisfied if a competitor *is serving either residential or business customers over its own facilities*. Section 271(c)(1)(A), however, clearly requires a different interpretation. To quote the statute, a competing service provider must offer telephone exchange service to 'residential and business subscribers . . . either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities.' Track A is thus satisfied if – and only if – a BOC faces facilities-based competition in both residential and business markets. Neither the statute nor its legislative history permits any other interpretation; I know this because I drafted both texts.

Letter from Tom Bliley, Chairman, U.S. House of Representatives, Committee on Commerce, to Reed Hundt, Chairman, Federal Communications Commission (June 20, 1997), reprinted in 143 Cong. Rec. S7284-03 (July 11, 1997) (emphasis added).

Moreover, Qwest's reliance on the *Louisiana II* and *Kansas/Oklahoma 271 Orders* is misplaced because the issue presented here is different from the issues presented in those proceedings. In *Louisiana II*, the BOC applicant sought to satisfy Track A based on a predominantly facilities-based carrier that undisputably provided facilities-based local telephone service to business customers, but served residential subscribers only via resale.[20] That is, the "competitor" that the applicant relied on for its Track A residential showing was a predominantly facilities-based carrier. Not so here, where Qwest makes no claim that the specialized, niche resellers that it relies on to satisfy Track A provide facilities-based local telephone service to *any* customer in New Mexico. As DOJ noted, "Qwest presented to the New Mexico PRC evidence regarding the overall level of residential resale service in New Mexico rather than evidence of a

[17] AT&T Comments at 12.

[18] Qwest Reply at 18; *see also id.* ("the Commission determined that Track A requires applicants to demonstrate merely that there is facilities-based competition in either the residential or business segments of the market – but not both").

[19] AT&T at 11 n. 26 (citing *Kansas/Oklahoma 271 Order* ¶ 43 & n. 101; *Louisiana II 271 Order* ¶ 48).

[20] *Louisiana II 271 Order* ¶¶ 45-47.

predominantly facilities-based carrier serving residential subscribers via resale."[21] Thus, at no point in the *Louisiana II 271 Order* did the Commission consider or even suggest that a BOC such as Qwest could use a *pure* residential reseller in conjunction with a separate facilities-based provider of business services to satisfy Track A. Nor did the Commission make any such suggestion in the *Kansas/Oklahoma 271 Order*, where the Commission expressly found that there were competing carriers who served residential customers over their own facilities.[22] Accordingly, the Commission's *Louisiana II* and *Kansas/Oklahoma 271 Orders* provide no support for Qwest's novel proposal that the Commission ignore the express requirements of the statute and rely on carriers that are not facilities-based providers to satisfy Track A.

In any event, as AT&T demonstrated, none of the resale services offered in New Mexico are "commercial alternatives" to Qwest's local telephone service. Qwest concedes that resale in New Mexico is extremely limited (1033 lines)[23] and does not dispute that it is rapidly declining. Nor does Qwest dispute that the few remaining residential resale lines in New Mexico are served by niche carriers who target customers that have been denied service by Qwest and who offer these customers higher priced, lower quality service. Instead, Qwest argues that there is nothing in the Act or the Commission's rulings that precludes "CLEC customers who were disconnected by Qwest" from being "counted for purposes of Track A."[24] But, of course, there is. The Act requires Qwest to demonstrate the existence of "competing providers of telephone exchange service . . . to residential and business subscribers."[25] In holding that "the use of the term 'competing provider[]' in section 271(c)(1)(A) suggests that there must be an actual commercial alternative to the BOC," the Commission noted that the verb to "compete" has been defined as "'to seek or strive for something (as a position, possession, reward) for which others are also contending.'"[26] Under this definition, it is absurd to argue that the niche resellers that Qwest relies on "compete" with Qwest in any meaningful sense. These resellers are not striving for customers for whom Qwest is also contending. They are doing the opposite: striving for customers Qwest does not want to do business with. Accordingly, it would turn the term "competing provider" on its head to hold that the resellers are competing with Qwest.

Respectfully submitted,

/s/ Christopher T. Shenk
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cc: Bill Dever
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[21] DOJ Evaluation at 9-10.

[22] *Kansas/Oklahoma 271 Order* ¶ 41.

[23] Qwest Reply at 19.

[24] *Id.* at 20.

[25] 47 U.S.C. § 271(c)(1)(A).

[26] *Oklahoma 271 Order* ¶ 14 & n. 55 (quoting Webster's Third New International Dictionary (1971 ed.)).